No. 82-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SURE-TAN, INC. AND SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

Of Counsel:
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037
DAVID SILBERMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-945

SURE-TAN, INC. AND SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the respondent in this case.

INTEREST OF THE AMICUS CURIAE AND ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The AFL-CIO is a federation of 97 national and international unions having a total membership of approximately 13,500,000 working men and women. This motion is filed because petitioner has not granted consent for filing a brief *amicus curiae.*

This case involves the intersection of the national labor policy, which protects the right of employees to organize for purposes of collective bargaining, with the policies of the Immigration and Nationality Act (INA) to protect the job opportunities and labor standards of American workers by sharply limiting the entry of aliens to perform labor in the United States. In this case the Employer knowingly employed Mexican nationals who were subject to exclusion from the United States under the immigration laws. After these employees had voted to be represented by a union, the Employer caused the Immigration and Naturalization Service to remove them from the United States. The National Labor Relations Board found that the Company did so in retaliation for their union activities, and determined that the Employer had thereby violated §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA). The Employer defends his conduct here primarily by contending that the NLRB's unfair labor practice finding, and the remedy as approved by the court of appeals, are inconsistent with the policies of the immigration laws. Although the Employer was perfectly willing to employ Mexican nationals rather than American workers until the former voted for union representation, the Company now argues that the decision below is contrary to the interests of American workers. Pet. Br. 13.

The interest of the AFL-CIO in this case is that this cynical argument be rejected. Our brief demonstrates that the asserted conflict between the NLRA and the INA is spurious: Both statutes are designed to protect the interests of American workers. Reversal of the decision below would encourage the employment of illegal aliens rather than American workers because the aliens would henceforth be afraid of choosing union representation, thereby enabling their employers to be immune from union [illegible]ization.

CONCLUSION

For the above-stated reasons, this motion for leave to file an amicus curiae brief should be granted.

Respectfully submitted,

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

DAVID SILBERMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

U.S. Constitution:

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-945

SURE-TAN, INC. and SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

SUMMARY OF ARGUMENT

On the day after it was notified that a union had been certified as the collective bargaining representative of its employees, petitioner Sure-Tan wrote a letter to the Immigration & Naturalization Service ("INS") which questioned the immigration status of a majority of its employees, (who were in fact Mexican nationals) and ultimately caused the removal of five of those employees from

the United States. The National Labor Relations Board ("Board") determined that this conduct, which occurred against the background of widespread illegal interference by the Company with its employees' organizational rights under the National Labor Relations Act ("NLRA"), constituted a constructive discharge of these employees because of their support for the union and thereby violated §§ 8(a)(1) and 8(a)(3) of the NLRA.

The Company's principal contention in challenging that finding and in resisting the award of reinstatement and backpay to these five employees is that the decision below conflicts with the policies of the Immigration and Nationality Act ("INA"). The Company's contention is without merit; indeed, as we show in our agreement, it would undermine the policies of the INA, as well as those of the NLRA, to excuse the Company's conduct.

I. As this Court has long recognized, one of the "great purposes" of Congressional policy to restrict immigration has been "to protect American labor against the influx of foreign labor." *Karnuth v. United States*, 279 U.S. 231, 243. While the employment of illegal aliens has a severe adverse impact on the employment opportunities and wage standards of American workers, *De Canas v. Bica*, 424 U.S. 351, 356-357, it is attractive to the aliens because of the disparity between even the lowest-paying jobs in the United States and the wages available in their country of origin. For their part, unscrupulous employers have a strong economic incentive to seek out illegal aliens "as a source of cheap labor." See *Plyler v. Doe*, 457 U.S. 202, 218-2193.

Sure-Tan's argument that it is being penalized "for reporting a suspected violation of the law" (Pet. Br. 16) depends on artificially isolating the action which the Company took to cause the termination of the aliens' employment from the entire prior relationship, and from its motive for the report. Sure-Tan made no inquiry concern-

ing the immigration status of these Mexican nationals in hiring them; nor did the Company report these employees to the INS upon learning "several months *before* the election that 'these men were illegally here.'" (672 F.2d 592, 600, emphasis in original). On the contrary, Sure-Tan continued to benefit from the fruits of their labor, and reported these employees to the INS only after the union had been certified. As the court below observed:

> There seems nothing like a successful union election to concentrate an employer's mind on the color of its workers' visas (if they exist) and on its moral obligations to expel its (once faithful) employees from the country. [672 F.2d at 601, n.14.]

It is only in these circumstances, in which the employer's NLRA-prohibited motivation is patent, that the decision below proscribes an employer from reporting his employees to the INS.

If the Company's conduct herein is immunized by the INA, the policies of that Act, and the American workers whom the INA is designed to protect would inevitably suffer. As the court below said, it "would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy." 672 F.2d at 601; see also *N.L.R.B. v. Sure-Tan, Inc.*, 583 F.2d 355, 360 (C.A. 7); *N.L.R.B. v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (C.A. 9); *Gates v. Rivers Construction Co., Inc.*, 515 P.2d 1020, 1022 (Sup. Ct., Alaska).

The Company invokes the line of decisions culminating in *Bill Johnson's Restaurants, Inc. v. NLRB*, —— U.S. ——, 51 L.W. 4636 (May 31, 1983), which have construed federal statutes narrowly to avoid serious questions of interference with the First Amendment right to petition for redress of grievances. These cases provide the Company with no support, because Sure-Tan was re-

dressing no grievance in causing the removal of its employees from the United States. Unlike, for example, Bill Johnson's Restaurants, which had brought a state court suit not only to interfere with its employees' organizational rights, but also to protect its own reputation, Sure-Tan acted solely to achieve ends prohibited by the NLRA. Here the Company was only "aggrieved" by the presence of the five Mexican nationals when those employees had the temerity to vote for union representation. Moreover, whereas in *Bill Johnson's Restaurants* the Court recognized a countervailing State interest in allowing the employer's defamation action, here the policies of the INA would be defeated by immunizing Sure-Tan's conduct.

II. The award of a minimum of six-months' backpay to the five individual discriminatees is consistent with well-established NLRA remedial principles. While a discriminatee is not entitled to backpay when he is unavailable for work, his backpay does continue to accrue if that unavailability is due to the unfair labor practice itself. Here, the employees' removal from the United States was caused by the unfair labor practice, and there is a reasonable assumption that, but for the Company's letter to the INS, they would have remained in the country, and in the Company's employ for at least six months. It is only for this limited period that these individuals can receive back pay if they remain outside the United States, and reinstatement is not required unless the discriminatee gains lawful reentry to this country. Thus, contrary to the Company's contention, there is no conflict between this remedy and the immigration laws.

The Company's other objections to the order present no question meriting this Court's attention and the writ of certiorari should be dismissed with respect to Question 4 raised by the petition.

ARGUMENT

I.

A. We adopt the Court of Appeals' summary of the factual background of this case:

> Respondent Sure-Tan, Inc., and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois. Both firms are owned and operated by Steve and John Surak, and at the times relevant to this case they employed approximately eleven workers. Most of these employees were Mexican nationals in the United States without visas or work permits. A union organization drive began at Sure-Tan in July, 1976, and eight employees signed cards authorizing the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "Union") to act as their collective bargaining representative. On August 12, 1976 the Union filed an election petition with the [National Labor Relations] Board and an election was held on December 10, 1976. The Union won the election, and on January 19, 1977, the Board notified Sure-Tan that its objections were overruled and that the Union was certified as the employees' collective bargaining representative [672 F.2d at 592 and 595-596, footnotes omitted.] [1]

The questions before this Court arise from Sure-Tan's drastic response to the Board's notification that the Union had been certified: Sure-Tan constructively discharged five of its employees by causing the Immigration and Naturalization Service ("INS") to remove these employees from the United States as illegal aliens.[2] In challenging

---

[1] As the Court of Appeals observed, the Board had found that Sure-Tan, Inc. and Surak Leather Co. constituted a single integrated employer, *Sure-Tan, Inc.*, 234 NLRB 1181, 1189, affirmed on this point, *N.L.R.B. v. Sure-Tan, Inc.*, 583 F.2d 355, 358 (C.A. 7), hereafter *"Sure-Tan I."* See 672 F.2d at 595, n.1.

[2] Sure-Tan's continued denial (Pet. Br. 13-15) that the Company constructively discharged these employees by its letter of Janu-

the finding that Sure-Tan thereby violated the National Labor Relations Act ("NLRA"), and in resisting the reinstatement and backpay remedy, petitioner contends primarily that the decision below conflicts with the policies of the Immigration and Nationality Act ("INA").[3] We shall show, however: that insofar as is relevant to this case, the policies of the two statutes are entirely consistent with each other; that, on the facts of this case, the decision below is an entirely correct interpretation of the NLRA; and that reversal of the decision below would defeat the policy of the INA by encouraging employers to hire illegal aliens.

---

ary 20, 1977 to the INS which questioned their and other Mexican nationals' immigration status, see 672 F.2d at 599, is, as the Court of Appeals ruled, "specious," *id.* at 601. Sure-Tan's observation that "the return of the illegal aliens was 'proximately caused' by their own illegal status" is a palpable evasion of the real issue, which is whether Sure-Tan's "inquiry to the INS", which "facilitated the Service's performance of its statutory obligations" (Pet. Br. 14) was *a legal cause* of the severance of these individuals' employment. That question was correctly answered in the affirmative by the Board and the court below. To treat the actions of the INS as a superseding cause which excuses Sure-Tan from responsibility for the consequences of its letter to the INS, would be contrary to common sense and established legal principle:

> Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause. [A.L.I. Restatement of Torts Second, § 442 A.]

Here, of course, the actor's conduct (writing the letter to INS) was not negligent but deliberate, and the harm to the employees was precisely that which the actor intended, as the Company no longer disputes, see p. 12, *infra*. The fact that the INS' "actions were nondiscriminatory duties mandated by the federal immigration laws," Pet. Br. 14, rendered the occurrence of the risk created thereby "foreseeable", if not inevitable.

[3] Petitioner's subordinate arguments, that its letter to the INS was privileged, Pet. Br. 16-19, and that the backpay remedy improperly rewards illegal aliens, *e.g.*, *id.* at 20-21, also depend on petitioner's misunderstanding of the immigration and labor laws, see pp. 18-21, and 24, *infra*.

B. It is a commonplace that a major purpose of the NLRA is to remedy the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employees" which "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." Declaration of Policy, § 1.

The restrictions on immigration in the INA are also designed to protect American workers. As this Court said in 1929:

> The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor. [*Karnuth v. United States*, 279 U.S. 231, 243.]

Section 212(a)(14), 8 U.S.C. § 1182(a)(14)[4] therefore

---

[4] In its present version § 212(a)(14) provides:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * *
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section

lists among the classes who shall be excluded from admission to the United States those who seek "to enter the United States for the purpose of performing skilled or unskilled labor" unless the Secretary of Labor determines and certifies to the Attorney General that the aliens will not compete with and that their employment will not adversely affect the wages and working conditions of workers in the United States similarly employed.[5]

203(a)(3) and (6), and to nonpreference immigrant aliens described in section 303(a)(8), * * *.

[5] In its original version § 212(a)(14) came into the law as part of the major restructuring of the immigration laws by the Immigration and Nationality Act of 1952, 66 Stat. 183. The section then provided for the exclusion of aliens seeking to perform work in the United States if the Secretary of Labor certified that workers are available in the United States to perform that work or that the employment of such aliens would adversely affect the wages and working conditions of workers in the United States similarly employed. The 1965 Act (P.L. 89-236, 79 Stat. 917) amended this provision to exclude aliens seeking work in the United States unless the Secretary certified that there were *not* available workers and that the employment of the aliens would *not* adversely affect the wages and working conditions of workers in the United States similarly employed. See 1 Gordon & Rosenfield, Immigration Law and Procedure, § 240 a, pp. 2-288 to 2-291 (1983 ed.). The Senate Report on the 1965 amendment stated:

> Simultaneous with the abolition of national quotas, controls to protect the American labor market from an influx of both skilled and unskilled foreign labor are strengthened. * * * [T]he provision of existing law * * * has the effect of excluding any intending immigrant within the scope of the certification who would likely displace a qualified American worker or whose employment in the United States would adversely affect the wages and working conditions of workers similarly employed in the United States. Under the instant bill, this procedure is substantially changed. The primary responsibility is placed upon the intending immigrant to obtain the Secretary of Labor's clearance prior to the issuance of a visa establishing (1) that there are not sufficient workers in the United States at the alien's destination who are able, willing, and qualified to perform the skilled or unskilled labor and (2) that the employment of the alien will not adversely affect wages and

In *DeCanas v. Bica*, 424 U.S. 351, this Court described the economic impact which the employment of illegal aliens has on the American workers with whom those aliens compete for jobs:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. [424 U.S. at 356-357.]

The present immigration laws have, however, been notoriously unsuccessful in preventing the employment of aliens who do not qualify for admission under § 212(a)(14). In *Plyler v. Doe*, 457 U.S. 202, the Court observed:

> Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders. [457 U.S. at 218.] [6]

---

working condition of U.S. citizens similarly employed. * * * [S. Rep. 784, 89th Cong., 1st Sess., 15 (1965), emphasis added.]

The Courts of Appeals are divided as to whether the 1965 Act sets up a presumption that aliens may not enter the United States for permanent employment. Contrast *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (C.A. D.C.), *cert. den.*, 419 U.S. 1038, quoted with approval at Pet. Br. 23-24, n.14, and by Judge Wood in dissenting in *Sure-Tan I* (583 F.2d at 361-362) with *Production Tool v. Employment & Training Admin.*, 688 F.2d 1161, 1168-1170 (C.A. 7, Wood, J.) disapproving *Pesikoff*. Since both Courts of Appeals are agreed that § 212(a)(14) is designed to protect the American labor market, the conflict between them concerning the degree of protection provided need not be resolved herein.

[6] The Court noted the Attorney General's recent estimate that there are between 3 and 6 million illegal aliens within the United States. 457 U.S. at 218, n.17.

Employment opportunities in the United States are attractive to aliens because of the disparity between even the lowest-paying jobs in the United States and the wages available in their country of origin. For their part, unscrupulous employers have a strong economic incentive to seek out illegal aliens "as a source of cheap labor." *Id.* at 219.

It is clear from the foregoing that the policies of the National Labor Relations Act and the Immigration and Nationality Act are consistent and complementary insofar as they protect the labor standards of American workers.

It is likewise clear that nothing in the INA gives an employer the *right* to hire aliens who have not complied with the requirements of § 212(a)(14). "It is true", as the Court recognized in *De Canas, supra*, that "a proviso to 8 U.S.C. § 1324, making it a felony to harbor illegal entrants, provides that 'employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.' " 424 U.S. at 360.[7] But *De Canas* squarely held that 8 U.S.C. § 1324 does not embody a federal policy which preempts a state law which makes it a crime to hire illegal aliens. See 424 U.S. at 360-361. Nor may the aforesaid proviso (or any other provision of the INA) be read to immunize conduct which violates the NLRA. The judicial duty is to give harmonious operation and effect to all statutory provisions if possible, absent some explicit indication of legislative intent derived from the words of the statute or its legislative history. See, *e.g.*, *Watt v. Alaska*, 451 U.S. 259, 267; *Morton v. Mancari*, 417 U.S. 535, 549.

---

[7] The Court noted that "construction of the proviso as not immunizing an employer who knowingly employs illegal aliens may be possible." 424 U.S. at 360, n.9. Sure-Tan understandably does not contend that although the Company knowingly employed illegal aliens—as was found below, see p. 12, *infra*—it thereby violated § 1324, or that the termination of their employment was designed to end a continued violation of that provision.

C. The foregoing discussion teaches two basic lessons. First, there is no inconsistency or conflict between the NLRA and the INA that requires the former to yield to the latter. Second, there is a strong public policy against the employment of aliens who have not satisfied the certification requirement of § 212(a)(14) of the INA. It is against this background that the paradoxical reliance by Sure-Tan—which employed illegal aliens contrary to the policy of the INA—on the INA as a defense to the charge that the Company's constructive discharge of those employees violates the NLRA must be evaluated.

Sure-Tan asserts that the decision below "results in penalizing Sure-Tan for reporting a suspected violation of law." Pet. Br. 16. This argument depends on artificially isolating the action Sure-Tan took to cause the termination of the aliens' employment from the entire prior relationship and from its motive for the report.

If, when each of the aliens had applied for employment, Sure-Tan had sought to determine whether the applicants were lawfully in the country, and on learning that they were not had so informed the INS, the national immigration policy would have been served, and no question under the NLRA could have arisen. This would have been the proper course for Sure-Tan, as the Ninth Circuit observed in the sentence quoted at Pet. Br. 16: "An employer who suspects that an employee is in the United States without proper authority should report this information to the INS."[8] But that is not what Sure-Tan did. As the court below observed:

> We are not so naive as to believe that Sure-Tan does not share some practical blame in this case for any alleged violation of the immigration laws. We find it difficult to believe that a metropolitan Chicago employer can employ a work force almost exclusively made of Spanish-speaking men of Mexican origin

[8] *N.L.R.B. v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (C.A. 9). We show at pp. 16 to 17, *infra* that this sentence is wrested out of context at p. 16 of Sure-Tan's brief.

> at wages within pennies of the minimum wage (and at hard and unappetizing work) without even suspecting that some of these employees are illegal aliens. [672 F.2d at 601, n.14.]

Even if Sure-Tan did not know or suspect that the individual whom the Company was hiring were illegal aliens, the Board and the court below determined that Sure-Tan knew "several months *before* the [union representation] election that 'these men were illegally here.'"[9] Sure-Tan's brief nowhere acknowledges—although it no longer disputes—that Sure-Tan knowingly continued to employ these illegal aliens for several months.[10] Yet Sure-Tan did not inform the INS of the presence of the illegal aliens in its employ until the day after the Company was notified that the Board had certified the Union. The "stunning obviousness of the timing"[11] and the background of Sure-Tan's other unfair labor practices in the course of the Union's organization drive,[12] leave no doubt of Sure-Tan's anti-union animus in writing the INS, and thereby causing the alien employees' discharge.

---

[9] 672 F.2d at 600, quoting from an affidavit of one of Sure-Tan's owners and operators, John Surak (Court of Appeals' emphasis).

[10] In this connection the Court of Appeals "note[d] that the argument advanced by counsel on this appeal regarding the Surak brothers' knowledge of the illegal alien status of these employees borders on the ludicrous when considered in connection with the prior affidavits of fact procured by this same counsel." 672 F.2d at 600, n.12.

[11] *N.L.R.B. v. Rubin*, 424 F.2d 748, 750 (C.A. 2).

[12] As the Court of Appeals observed, the "record is replete with examples of Sure-Tan's blatantly illegal course of conduct to discourage its employees from supporting the Union." 672 F.2d at 601-602. Earlier in the opinion the Court had affirmed the Board's findings, not contested here, that the "Surak brothers threatened, coerced and interrogated their employees in violation of sections 8(a)(1), 8(a)(3) and 8(a)(4)." *Id.* at 602. See *id.* at 596-599, describing these unfair labor practices. The Court also noted, *id.* at 602, that in *Sure-Tan I* it had enforced the Board Order finding the employer guilty of violating § 8(a)(5) by refusing to bargain with the certified union.

Sure-Tan charges the Court of Appeals and the Board with holding "in effect, that once illegal alien workers engage in protected union activities, an employer may no longer inquire with the INS, even if it suspects that it might be employing illegal aliens." Pet. Br. 16. Of course, they have not so held "in effect" or otherwise. As we have emphasized, pp. 11 to 12, *supra*, Sure-Tan would not have violated the NLRA if the Company had written the INS when these Mexican nationals first applied for employment or at any time thereafter, provided that it did not do so for the purpose forbidden by § 8(a)(3) of the NLRA. The Court of Appeals' opinion makes entirely clear the narrow set of circumstances in which discharge by notification to the INS is illegal:

> The close time relationships involved shed a clear light on Sure-Tan's motives. Sure-Tan sent the letter to the INS only one day after receiving the Regional Director's order overruling Sure-Tan's objections to the election and requiring Sure-Tan to bargain with the Union. *Sure-Tan's deathbed conversion to enthusiastic enforcement of the immigration laws, which of course, coincided with the Union's victory in the representation election, can hardly provide it with any defense under section 8(a)(3). In fact, in this case as probably in others the immigration laws have provided an employer with a powerful tool for unfair and oppressive treatment of migrant labor.* The immigration laws have been conveniently employed to impose the ultimate penalty of discharge (and deportation or its equivalent) if migrant laborers should have the effrontery to join a union. As Chief Judge Cummings noted in our first *Sure-Tan* case, "it ill becomes the Company to argue after losing the election that certification would conflict with the immigration laws. 583 F.2d at 360. [672 F.2d at 602, emphasis supplied.]

It is, of course, no purpose of the immigration laws to enable American employers to hire and exploit illegal aliens.

D. To be sure, Sure-Tan's letter to the INS, viewed in isolation, would further the policy of the immigration laws to the limited extent that the letter caused the removal of these five aliens who lacked the requisite documentation from the American work force. For Sure-Tan thereby put in motion machinery to discontinue its own flouting of the immigration policy.[13] In broader perspective, however, Sure-Tan's course of conduct, including its culminating letter to the INS would, if permitted, seriously undermine the immigration policy. For such a permission would *encourage* employers to hire illegal aliens by creating a class of workers who would be terrified of exercising the organizational and representational rights declared in § 7 of the NLRA. This point was well made by Judge Cummings for the court below in *Sure-Tan I* in ruling that illegal aliens are "employees" for the purpose of § 2(3) of the NLRA and entitled to vote in representation elections:[14]

> If a company can avoid certification merely by hiring aliens, undoubtedly some companies will choose to hire such aliens in order to gain immunity from labor unions. Cf. *Gates v. Rivers Construction Co.*, 515 P.2d 1020, 1022 (Alaska 1973). Thus by refusing to certify unions with a majority of alien members we would be giving employers an extra incentive to hire aliens and thus would be defeating the goals of the immigration laws.
>
> The likelihood of this result may be illustrated even by the facts of this case, in which, according to the Regional Director's January 17, 1977, supplemental decisions (Board App. 10), John Surak, president of Sure-Tan, Inc., stated that several months

---

[13] We note, however, that the record does not show whether Sure-Tan replaced these individuals with other illegal aliens, or with persons entitled to work, that is, American citizens or documented aliens.

[14] Sure-Tan does not challenge these propositions in this Court.

before the election was held, he was told that the "employees were illegally present in the United States." While the Board chose not so to infer in this case, the obvious possibility is that a company would hire illegal aliens without informing the Immigration and Naturalization Service and without seeking certification of the aliens from the Secretary of Labor, as more responsible employers frequently do (see, *e.g., Stenographic Machines v. Regional Administrator*, 577 F.2d 521 (7th Cir. 1978), knowing that if the aliens successfully unionize they could then be reported to the Immigration and Naturalization Service and deported. It is not necessary to hold here that the employer is estopped from making this argument, but at the least it is clear that in view of this prior knowledge (and prior disregard of its alleged duty under the immigration laws), it ill becomes the Company to argue after losing the election that certification would conflict with the immigration laws [583 F.2d at 360, footnote omitted.][15]

---

[15] *Gates v. Rivers Construction Co., Inc.*, 515 P.2d 1020 (Sup. Ct. Alaska), which was cited in *Sure-Tan I*, held that an employer of an illegal alien could not refuse to pay the alien's salary. Justice Boochever (now a United States Circuit Judge), reasoned:

> [S]ince the purpose of this section would appear to be the safeguarding of American labor from unwanted competition, the appellant's contract should be enforced because such an objective would not be furthered by permitting employers knowingly to employ excludable aliens and then, with impunity, to refuse to pay them for their services. Indeed, to so hold could well have the opposite effect from the one intended, by encouraging employers to enter into the very type of contracts sought to be prevented. [515 P.2d at 1022.]

The other reasons given by the *Gates* court for enforcing the employment contract are likewise pertinent here. First, that Court observed that the INA does not declare that labor contracts of illegal aliens are void, see 515 P.2d at 1021-1022; so, too, there is nothing in the INA which limits the scope of the protections or remedies provided by the NLRA. Second, the court considered it to be "contrary to general considerations of equity and fairness" to permit the employer "who knowingly participated in an illegal transaction * * * to profit thereby at the expense of the appellant," *id.* at 1022;

In *N.L.R.B. v. Apollo Tire Co., Inc., supra*, a case on which Sure-Tan relies (Pet. Br. 16), the Ninth Circuit approved the reasoning of *Sure-Tan I*:

> We agree with the *Sure Tan* majority that the Board's interpretation best furthers the policies underlying the immigration laws. Were we to hold the NLRA inapplicable to illegal aliens, employers would be encouraged to hire such persons in hopes of circumventing their labor laws. The result would be more work for illegal aliens and violations of the immigration laws would be encouraged.
>
> Furthermore, we hesitate to require the Board to delve into immigration matters, out of its field of expertise. Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service. *An employer who suspects that an employee is in the United States without proper authority should report this information to the INS.* Our holding merely insures that an employer is not permitted to commit unfair labor practices in the knowledge that the Board is powerless to remedy them. [604 F.2d at 1183, emphasis added to show the sentence quoted at Pet. Br. 16.]

Thus, in the sentence on which Sure-Tan relies, the *Apollo Tire* court did not voice approval of employer notification to the INS of their employees' illegal status without regard to the circumstances. Rather, the Ninth Circuit declared that employers who suspected that an employee is an illegal alien should report this fact to the INS *rather than* committing unfair labor practices against the alien. The court did not confront a situation like the present case, where the employer knowingly em-

---

so here, acceptance of petitioner's position would permit it to injure employees because they had voted for the union, after Sure-Tan had benefited from their labor. See also *Nizamuddowlah v. Ben Cabaret*, 92 Misc. 2d 220, 222-223 (N.Y. Sup. Ct., Queens Cty.)

ployed illegal aliens, thereby enjoying the benefits of cheap labor, and reported them to the INS only to punish the employees for exercising their rights under the NLRA. And the thrust of the entire passage quoted herein, and of the court's holding, is that notification under such circumstances would not be lawful, because, under Sure-Tan's theory (as under a rule which excluded illegal aliens entirely from the protection of the NLRA) this would encourage employers "to hire such persons in hopes of circumventing the labor laws." 604 F.2d at 1183. For the sum and substance of Sure-Tan's position is that the Company should be "permitted to commit unfair labor practices"—that is, to injure illegal aliens because of their exercise of their rights under the NLRA—"in the knowledge that the Board is powerless to remedy them." *Id.* As the court below said when Sure-Tan made the same argument,

> an employer has no right to rely on a "moral obligation" to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of section 8(a)(3). * * *
>
> A contrary holding would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy. [672 F.2d at 601, citation and footnote omitted.]

In an accompanying footnote the Court below pointedly observed:

> There seems nothing like a successful union election to concentrate an employer's mind on the color of its workers' visas (if they exist) and on its moral obligations to expel its (once faithful) employees from the country. [672 F.2d at 601, n.14.] [16]

---

[16] Sure-Tan's invocation of the misprision of felony statute, 18 U.S.C. § 4, Pet. Br. 16, n.6, does not reflect favorably on the *bona fides* of its position. If Sure-Tan had believed that this stat-

E. Sure-Tan's claim of a constitutional right, Pet. Br. 16-19, stands on no firmer ground than its suggestion that the Company might have had a duty of disclosure. We do not question Sure-Tan's right "to petition the Government for a redress of grievances", but its letter to the INS did not constitute an exercise of that constitutional right. What was the "grievance" of which Sure-Tan sought redress? It was surely not that these five individuals were working in the United States contrary to the INA; Sure-Tan had been entirely satisfied to have these individuals as employees despite that law *until they voted for Union representation.* Rather, Sure-Tan doubtless felt aggrieved by that decision of its employees, and the Labor Board's resulting certification of the Union. But that is not a "grievance" in the constitutional sense.

The line of cases from *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 through *Bill Johnson's Restaurants, Inc. v. NLRB*, —— U.S. ——, 51 L.W. 4636 (May 31, 1983) cited at Pet. Br. 17-18, does not support petitioner's novel invocation of the "redress of grievances" clause to immunize Sure-Tan's destruction of the employees' NLRA rights. In those cases the Court held (construing federal statutes in light of the First Amendment) that an illegal motive to injure others was an insufficient basis for forbidding a party from petitioning the appropriate public officials for the protection of that party's legitimate interests. For example, in the most recent of these cases, *Bill Johnson's Restaurants*, the employer, though motivated by a desire to discourage the exercise of NLRA rights, had asserted, in state court, an interest in its own reputation, protected by State law. See 51

---

ute might require the Company to notify the INS of the presence of illegal aliens, that should have been done so months previously, when it admittedly knew its employees' status, see p. 12 and nn.9 and 10, *supra*. 18 U.S.C. § 4 is plainly inapposite however, since it is not a crime for an undocumented alien to enter and work in the United States; the sanction provided by the INA is deportation. The term "illegal alien" is, in this respect, somewhat misleading.

L.W. at 4639. But while Sure-Tan was acting with the same illegal motive, unlike the employer in that case, the Company was not protecting any lawful interest of its own. The INA was not enacted for the protection of employers who have hired illegal aliens.

There is an additional significant difference between this case and *Bill Johnson's*. In the latter case, the Court did not treat the employer's right to access to the courts as an independently sufficient reason for reversing the Board's unfair labor practice finding. Rather, the Court relied also on "the States' compelling interest in the maintenance of a domestic peace", in recognition of which "the Court has construed the [NLRA] as not preempting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.' " 51 L.W. at 4639, quoting *San Diego Unions v. Garmon*, 359 U.S. 236, 244. Pointing to such precedents as *Linn v. Plant Guard Workers*, 383 U.S. 53 (holding that an employer can properly recover damages in a tort action arising out of labor dispute if it can prove malice and actual injury) and others in which a tort remedy was held not to be preempted by the NLRA, the Court concluded that the state interests identified therein would be undermined if it were held unlawful under the NLRA for an employer to prosecute a meritorious action even if he was improperly motivated. 51 L.W. at 4639. Whereas in *Bill Johnson's* there was conflict between the Board's unfair labor practice finding and state interests, there is no parallel conflict between the unfair labor practice finding against Sure-Tan and the policies of the INA. See pp. 7 to 13, *supra*. Rather, to excuse Sure-Tan's course of conduct would encourage employers to offer employment to—and thus attract to this country—aliens who may not lawfully enter for the purpose of seeking and holding jobs in this country. See pp. 14 to 17, *supra*. Thus, to hold that the INA grants employers a grievable interest and thereby provides them with a means for avoiding the obligations of the NLRA "would

indeed be to 'turn the blade inward'" Cf. *Graham v. Brotherhood of Firemen*, 338 U.S. 232, 237.

It bears emphasis in this connection that Judge Wood's concern that enforcement of the Board's Order would adversely affect American workers—a position that Sure-Tan, which employed illegal aliens rather than American workers, cynically adopts, Pet. Br. 15—is misdirected. There is far more at stake here than the question of whether the five Mexican nationals will lose some backpay, and the opportunity—if they obtain a Labor Department certification enabling them to return—to be reinstated at Sure-Tan. If Sure-Tan prevails in this case, American workers throughout the United States will be confronted by employers who will have an additional incentive to hire illegal aliens. These employers would be secure in their knowledge that such employees, in contrast with American citizens and aliens who have Labor Department certification, will not be protected by §§ 7 and 8(a)(3) of the NLRA. Such employees will be uniquely vulnerable to intimidation and discrimination to discourage union membership. An employer who hires a sufficient number of illegal aliens will be virtually unionproof, a condition to which many employers aspire, and which is especially valuable to those who pay substandard wages. It is to be remembered that it was an American union which organized Sure-Tan's employees and was certified as their representative. See 583 F.2d at 356, n.2. Given the reality that vast numbers of employers do hire illegal aliens, such unions have little choice but to attempt to organize those workers, and thereby to counteract, at least in part, the adverse economic effects which this Court identified in *DeCanas*, 424 U.S. at 356-357, quoted at p. 9, *supra*.[17] Employers

[17] Unions do not have the alternative of reporting illegal aliens to the INS. Unlike the employer, the union will ordinarily not even know the employees' identity, let alone whether they have a certificate from the Secretary of Labor. And it would be unprincipled for a union to solicit the aliens' interest and support and then to report them to the immigration authorities.

would have additional motivation to seek out illegal aliens if they knew that unions would not attempt to organize and represent them. Cf. pp. 14 to 17, *supra*. Moreover, if the union is successful in obtaining certification it has the opportunity, through collective bargaining, to improve these employees' wages and working conditions, thereby depriving the employer of his unfair economic advantage over competitors, the employers of American labor. That unions need to do just that is axiomatic. *American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209. And it is that unfair advantage Sure-Tan has sought to achieve and retain by first flouting and then exploiting the immigration laws.

II.

A. Under the decision below, the five individuals who lost their jobs as a result of the employer's unfair labor practice are to be awarded backpay, subject to certain conditions, to compensate those individuals for the losses they suffered as a result of the employer's unlawful act. Any discriminatee who was "unavailab[le for work] because of enforced absence from the country will have [his] backpay tolled accordingly" during the period of his absence. 246 N.L.R.B. at 1788; *see also* 672 F.2d at 606. However, each discriminatee is to receive backpay for at least six months on the ground that "six months is a reasonable assumption" as to the "minimum [time] during which the discriminatees might reasonably have remained employed without apprehension by INS but for the employer's unfair labor practice." 672 F.2d at 606.[18]

---

[18] The six-month backpay floor originally was proposed by the Court of Appeals as a step the Board could take, "if it sees fit." 672 F.2d at 606. Following that court's decision, the Board submitted to the court a proposed judgment order which, as the Board has stated in this Court, "was intended to grant the discriminatees the suggested minimum backpay award." Br. for the NLRB in Opposition at 8 n.8. (The Board's proposed order appears in Pet.

Sure-Tan here challenges this six-month "floor" for the backpay award, claiming that the award of backpay for any period of time during which a discriminatee is in Mexico is impermissible under the NLRA and the immigration laws. As we proceed to show, the company's challenge is without merit; the floor on the backpay award represents a logical application of well-established NLRA remedial principles to a *sui generis* factual situation, and nothing in its application conflicts with the immigration laws.

1. The General Counsel of the NLRB has developed a Casehandling Manual which, *inter alia*, sets forth the rules the Board has developed through its decisions for computing backpay. Section 10530.1(a) defines the "period covered" by a backpay award as follows:

> The period covered is that from the discriminatory loss or refusal of employment to a bona fide offer or reinstatement, but it does not include any period * * * during which respondent proves the discriminatee was not available for work or has incurred a willful loss of earnings.

Sections 10612-10626 set forth in detail the rules for determining when a discriminatee should be deemed to have been "unavailabl[e] for work." The opening sentence of this part reaffirms the general principle: "When a discriminatee becomes unavailable gross backpay does not accrue until [the] discriminatee becomes available again. . . ." [19] But section 10612.1 sets forth an important caveat, grounded in the Board's decisions:

App. at 30a-33a.) The appellate court, however, was "uncertain" from the Board's proposed order "whether the Board has adopted th[e] suggestion," Pet. App. 28a; that court nonetheless mandated a six-month minimum backpay award because "in this admittedly unique case" such a minimum backpay award was required "if the policies of the NLRA are [to be] furthered," *id.*

[19] The Board reaffirmed this rule in the instant case: "Discriminatees who are . . . found to be unavailable for work . . . will have their backpay tolled accordingly." 246 NLRB at 788.

> In certain situations, unavailability through an injury suffered at interim employment, or an illness fairly attributable thereto, may not toll backpay. *Similar injuries resulting from unfair labor practimes may not toll backpay.* [Emphasis added.]

Sure-Tan does not here challenge, as a general matter, the Board's rule that backpay is not tolled when a discriminatee's unavailability "result[s] from unfair labor practices." The decision below simply applies this settled rule to what the Seventh Court properly termed "this admittedly unique case." Pet. App. 28a. As that court recognized, the Company's unfair labor practice "was the proximate cause" of the discriminatees' departure from this country and hence of their unavailability for work here. 672 F.2d at 592. Had Sure-Tan not contacted INS, the discriminatees would have remained in this country (and would have been available for work) for an additional period of time until "independent detection of them by INS" would have resulted in their departure and hence their independent unavailability for work; six months was viewed as a "reasonable assumption" of the duration of that period. Thus, the award of backpay for this six-month period during which discriminatee's unavailability was the result of Sure-Tan's unfair labor practice merely implements the general rule that backpay liability is not tolled when unavailability is the employer's doing.

2. As the foregoing makes clear, petitioners are simply wrong in contending that the six-month floor on the backpay award here "is patently punitive." Pet. Br. at 27. The discriminatees suffered a real loss of wages as a result of petitioners' unlawful acts. The six-month floor on the backpay award is an integral part of the attempt by the Board and the court below to compensate these discriminatees for the earnings they would have received but ofr the employers' discrimination. The discriminatees are to be awarded only the actual amount of the wages they would have received from Sure-Tan for this six-month

period, less any interim earnings the discriminatees received during this period. This is the essence of a *compensatory* remedy.

Petitioner's contention that the six-month floor on the backpay award "creates an untenable conflict between the NLRA and the immigration laws," Pet. Br. at 24, is without substance. The decision below does *not* proceed on the assumption that the discriminatees "had a right to remain in this country," *id.*; backpay is awarded for a limited period during which, as a practical matter, the discriminatees would in reasonable probability have remained in this country and worked for Sure-Tan if the Company had not, in an effort to penalize union activity, contacted the INS. Significantly, except for this limited period, the decision below does *not* permit backpay to be awarded while the discriminatees were outside the United States. Nor does the decision below require reinstatement unless a discriminatee gains lawful reentry to this country. And nothing in the decision below would require Sure-Tan or any other employer to hire an illegal alien or preclude petitioners or any other employer from firing an alien *because of that individual's illegal status.* Thus, the "conflict" between the decision below and the immigration laws is wholly illusory.[20]

B. The final question in the petition for certiorari pertains to the propriety of the form of the reinstatement remedy: "Whether the NLRA requires that an offer of reinstatement to illegal aliens be held open for four years, be delivered in Mexico in a manner allowing verification

[20] Petitioners' assertion that the decision below creates an inducement to the discriminatees to unlawfully reenter the United States is equally untenable. Nothing in that decision conditions the discriminatees entitlement to *backpay* on their reentry; the discriminatees can claim their backpay by mail (or by lawfully entering the United States for a single day). And the decision below expressly conditions reinstatement to the discriminatees' securing *lawful* reentry, thus removing any incentive for the discriminatees to return here illegally in order to regain their jobs.

of receipt, and be written in Spanish." This question involves a complex of detailed, practical rules the Board has evolved in the course of the day-to-day administration of the Act for determining whether there has been a sufficient offer of reinstatement to toll the remains of back pay. Cf. *Ford Motor Co. v. EEOC*, —— U.S. ——, 50 L.W. 4937, 4940-4941 (June 28, 1982). We do not believe that we can make a sufficient contribution with respect to these issues to warrant extending this brief *amicus curiae*. We do suggest, however, that because these issues—such as whether an offer of reinstatement should be sent by registered or regular mail—do not present any question of legal principle, decision thereon would require the Court to immerse itself in the minutiae of the administration of the NLRA. Accordingly, we respectfully suggest that it may be appropriate to dismiss the writ of certiorari as improvidently granted with respect to the fourth question. See, e.g., *Mishkin v. New York*, 383 U.S. 502, 513-14.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals for the Seventh Circuit should be affirmed. With respect to Question 4 presented by the petition for certiorari, the writ of certiorari should be dismissed.

Respectfully subimtted,

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

DAVID SILBERMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)